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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Scott Jordan Armendariz,

No. CV 15-0729-PHX-DGC (BSB)

10 Plaintiff,

11 v.

ORDER

12 Lynn T. Hamilton,

13 Defendant.

14
15 Plaintiff Scott Jordan Armendariz, who is confined in the Arizona State Prison
16 Complex-Yuma in San Luis, Arizona, has filed a *pro se* civil rights Complaint pursuant
17 to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 4).
18 The Court will dismiss this action.

19 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
22 The Court will assess an initial partial filing fee of \$17.84. The remainder of the fee will
23 be collected monthly in payments of 20% of the previous month's income credited to
24 Plaintiff's trust account each time the amount in the account exceeds \$10.00. 28 U.S.C.
25 § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government
26 agency to collect and forward the fees according to the statutory formula.

27 **II. Statutory Screening of Prisoner Complaints**

28 The Court is required to screen complaints brought by prisoners seeking relief

1 against a governmental entity or an officer or an employee of a governmental entity. 28
 2 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 3 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
 4 which relief may be granted, or that seek monetary relief from a defendant who is
 5 immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

6 A pleading must contain a “short and plain statement of the claim *showing* that the
 7 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
 8 does not demand detailed factual allegations, “it demands more than an unadorned, the-
 9 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 10 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 11 conclusory statements, do not suffice.” *Id.*

12 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 13 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 14 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
 15 content that allows the court to draw the reasonable inference that the defendant is liable
 16 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
 17 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
 18 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
 19 specific factual allegations may be consistent with a constitutional claim, a court must
 20 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
 21 at 681.

22 But as the United States Court of Appeals for the Ninth Circuit has instructed,
 23 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
 24 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
 25 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

27 If the Court determines that a pleading could be cured by the allegation of other
 28 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal

1 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).
 2 Plaintiff's Complaint will be dismissed for failure to state a claim, without leave to
 3 amend because the defects cannot be corrected.

4 **III. Failure to State a Claim**

5 In his Complaint, Plaintiff names Lynn T. Hamilton, his criminal defense attorney,
 6 as the sole Defendant. A prerequisite for any relief under 42 U.S.C. § 1983 is a showing
 7 that the defendant has acted under the color of state law. Whether an attorney
 8 representing a criminal defendant is a public defender, court-appointed counsel, or a
 9 privately retained attorney, he or she does not act under color of state law. *See Polk*
 10 *County v. Dodson*, 454 U.S. 312, 317-18 (1981). Therefore, Plaintiff's civil rights claims
 11 against Hamilton must fail unless Plaintiff can set out facts showing a conspiracy
 12 between his counsel and state officials to deny him the right to adequate representation
 13 under the Sixth Amendment. *See Tower v. Glover*, 467 U.S. 914, 920 (1984).

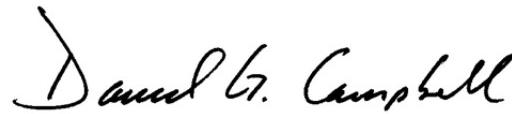
14 Moreover, Plaintiff's claim would be barred by *Heck v. Humphrey*, 512 U.S. 477,
 15 486 (1994), because violation of the Sixth Amendment right to counsel in a criminal
 16 proceeding would necessarily imply the invalidity of Plaintiff's conviction. Accordingly,
 17 Plaintiff's allegations will be dismissed for failure to state a claim. Because there are no
 18 facts Plaintiff could allege that would cure the defects described herein, the Court will
 19 dismiss the Complaint without leave to amend.

20 **IT IS ORDERED:**

- 21 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 4) is **granted**.
- 22 (2) As required by the accompanying Order to the appropriate government
 agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing
 fee of \$17.84.
- 23 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim pursuant to
 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.
- 24 (4) The Clerk of Court must make an entry on the docket stating that the
 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

1 (5) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C.
2 § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of
3 this decision would not be taken in good faith.

4 Dated this 9th day of June, 2015.

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9 David G. Campbell
10 United States District Judge

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